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IN THE

Supreme Court of the United States

OCTOBER TERM, 1941

No. 291

KENNETH M. KEEFE, ERNEST E. QUANTRELL and PELHAM C. WILMERDING, on behalf of themselves and all other owners and holders of bonds of Nine Mile-Halfway Drain District of Macomb County, Michigan,
Petitioners,
vs.
NINE MILE - HALFWAY DRAIN DISTRICT, a public quasi corporation of Macomb County, Michigan, et al.,
Respondents

PETITIONERS' REPLY BRIEF

We are quite familiar with this court's rule 38, and know that the writ of certiorari is sparingly granted. Yet running through the rule is the recognition that lower courts may commit grievous errors which this court should correct. The many cases in which certiorari has been granted and lower courts reversed proves the wisdom of supervisory jurisdiction in this court.

The rule implies that a fair showing of probable error by a lower court upon some question involving a constitutional right, a conflict with local law, or a conflict between the circuits, call for a review. All of these appear in this case.

I.

CONSTITUTIONAL RIGHTS

We think the court must reject the view advanced by respondents that a litigant cannot complain to this court that a court of appeals has denied him due process. If *Hansberry v. Lee,* 311 U. S. 32, had come to this court from a court of appeals, with a decision in identical terms with that rendered by the Supreme Court of Illinois, this court would have given the case the same consideration, the only difference being that it would then have been concerned with the application of the Fifth Amendment instead of the Fourteenth.

Without attempting to define due process, it surely means that a litigant must be given his day in court, with notice of the claim against him and a fair opportunity to be heard. When the court says that he has already had his day in court and must lose his case because some other tribunal has already decided against him in a case in which he is not a party, an appellate court would be remiss in its duties if it refused to at least consider the reasoning on which the lower court arrived at such conclusion.

When it appears that such reasoning is based upon a theory that someone else, whose interests are adverse to the litigant and who was never authorized to represent him in prior litigation, assumed to stand for him in such litigation, an appellate court must closely investigate the

reasoning upon which this unusual representative capacity is based.

In this case it is based upon a theory that one who purchases a bond of a Michigan drain district must deduce from a statute, which requires a taxpayer in a drain district who sues to cancel his taxes to join the drain commissioner, that he is conclusively bound in the future by adjudications made against the drain commissioner in such suits. We submit that there is such a wide gap between the express language of such statute and the interpretation which the court of appeals has placed upon it, that holders of drain bonds who find themselves denied relief because of this interpretation ought to be heard on the proposition that the interpretation is unsound. By Michigan law, the drain commissioner is only representative of the property owners and municipalities within the district, and there is no statute or decision which makes the commissioner a representative of bondholders.

We have already presented our view that the holding of the Circuit Court of Appeals that the state court decree in the taxpayers' case is *res judicata* against bondholders is so enmeshed in the argument of the Circuit Court of Appeals that it is impossible to extricate it, and still be certain that the conclusion would have been the same if this erroneous factor had not been considered (See p. 19 of our first brief).

The additional argument is made that bondholders were represented in the Township of Lake case because the same firm of attorneys which gave an opinion on the validity of the bonds acted as counsel in the Supreme Court for the drain commissioner. It seems incredible that counsel could suppose that a court could obtain jurisdiction of and make a decree binding on bondholders

scattered from Maine to California by the sole fact that the same attorney who had given an opinion to the underwriter of the bonds was employed by the drain commissioner.

II.

CONFLICT WITH LOCAL LAW

Respondents' protest against the course we suggest of awaiting the decision of a case now pending in the Supreme Court of Michigan, which will determine the local law on the questions involved here, is eloquent of their recognition of the error of the court of appeals. They want this case closed so that judges familiar with local law, and who have the last word as to what it is, can say nothing to upset the advantage they now possess.

We think it is trivial to argue that the case of *City of Highland Park, et al., v. Clark, et al.,* which the Supreme Court of Michigan will hear during the month of October of this year, can settle nothing so far as this court is concerned because it involves a different set of bonds. In an appendix to this brief we print a copy of the petition for mandamus filed in the Michigan Supreme Court (omitting exhibits except for the form of the bonds), and the answer to the order to show cause. This is sufficient to show that the crucial questions in this case are before the Michigan court. It must decide whether the drain law permits the building of projects which will afford complete drainage and sewerage service, whether, if such projects are illegal, bond recitals estop the district to assert such illegality against *bona fide* holders of the bonds, whether taxes must be levied to pay such bonds, and whether bondholders are protected by the certiorari provision of the law. It also must decide

whether the decree in a taxpayer's suit is *res judicata* against bondholders. The appendix further refutes the idea that this is a trumped-up case to delay a decision here. Bondholders other than petitioners here, with other counsel representing them, own half of the bonds involved and are entitled to sue for relief. Because they are citizens of Michigan, they must sue in the state court.

The precedent in *American Surety Co. v. Baldwin,* 287 U. S. 156, cited in our fist brief, we think applicable to the point advanced that this court recognizes the desirability of postponing action on an application for a writ until the state court has decided some pending action which will settle local law. The fact that the same parties are involved in the state litigation is of no consequence. What this court apparently desires is a declaration by the state court of last resort of its view on a disputed question of local law. Since our first brief was prepared, other precedents have come to our attention. In *Michalek v. U. S. Gypsum Co.,* 76 Fed. (2) 115, a federal court of appeals had decided that a plaintiff was barred recovery by a local statute of limitations. Plaintiff applied for certiorari on the ground that the statute applied was wrongly interpreted, and that under a proper interpretation his suit was not barred. At the time another case, *Schmid v. Merchants Dispatch and Transportation Co.*, was pending in the state court, which was decided after the petition for certiorari was filed, in which the state court of last resort (270 N. Y. 287) held contrary to the opinion of the federal court of appeals that the statute should not be interpreted in a manner to bar a suit of the nature alleged in the federal court. This court deferred action on the writ for many months, awaiting the decision of the New York court of last resort, and when the same was rendered, promptly reversed the court of

appeals on the ground that it had wrongly interpreted the state statute, *Michalek v. U. S. Gypsum Co.,* 298 U. S. 639, and remanded the case with directions to follow the New York decision.

During the last term of this court similar action was taken in *City Co. v. Stern and Chase Securities Corp v. Vogel,* 61 S. Ct. 823, cases involving the construction of a Minnesota statute of limitations. The court of appeals, in *City Co. v. Stern,* 110 Fed. (2) 601, and *Chase Securities Corp. v. Vogel,* 110 Fed. (2) 607, held that the statute should not be construed as barring plaintiff's claim. In an application for certiorari, petitioners showed that the same question was before the Minnesota court. This court deferred action on the application for ten months. When the Minnesota Supreme Court, in *Pomeroy v. National City Co.,* 296 N. W. 513, decided that the statute of limitations barred a similar claim and disagreed with the court of appeals, this court reversed the court of appeals, saying:

> "The petition for writ of certiorari is granted and the judgment is reversed. *Vandenbark v. Owens-Illinois Glass Co.,* 311 U. S. ..., 61 S. Ct. 347, 85 L. Ed. ..., decided January 6, 1941; *Pomeroy v. National City Co.,* ... Minn., 296 N. W. 518. The case is remanded to the Circuit Court of Appeals for further proceedings with respect to any questions not determined by the Supreme Court of Minnesota in the Pomeroy and Donaldson cases."

This general subject is treated in Robertson & Kirkham *"Jurisdiction of the Supreme Court of the United States,"* Sec. 290, p. 559, and Sec. 301, p. 602.

CF. *Thompson v. Magnolia Petroleum Co.,* 309 U. S. 478, and *Railroad Commission of Texas v. Pullman Co., et al.,* 61 S. Ct. 643.

This practice necessarily accords with the principle of avoiding conflict with state tribunals on matters of state law. Had the court done otherwise and lost jurisdiction, a grave injustice would have been done to parties who had lost their cases in the court of appeals.

When this court decided *Erie Railroad Co. v. Tompkins,* 304 U. S. 64, and overruled *Swift v. Tyson,* 16 Pet. 1, it must have known that its labors would be increased in determining where conflicts existed with state law. The numerous cases decided as a result of the Erie Railroad Company case prove the mass of litigation entailed. While most of the cases on the subject which this court has heard involved an avowed disregard by a court of appeals of some state decision on the ground that it still could exercise an independent judgment, this court cannot draw a hard and fast line so limiting its jurisdiction. Cases are bound to arise where state decisions are so clearly wrongly interpreted, or where applicable decisions are disregarded or ignored on untenable grounds, that courts of appeal must be restrained in the interest of justice. If a litigant in the federal courts in a case brought there on the ground of diverse citizenship is entitled to be judged according to the law of the state, an erroneous construction of such law ought not to be overlooked merely because a court of appeals declares its purpose to abide by such law. If this court were convinced that a court of appeals wrongly applied or construed a decision of this court, while professing to follow it, it surely would not hesitate in an important case to take jurisdiction. We fail to see any fundamental distinction which should cause this court to deny certiorari when the question arises as to whether a court of appeals has actually followed state law.

When a court of appeals announces that it intends to follow state law and its opinion is in conflict with authori-

tative expressions of the state court of last resort, the difficulty may be that it has a wrong conception of how to arrive at a determination of state law. We think that this point is largely the cause of our differences with respondents and the court of appeals. We believe that a brief consideration of this subject with reference to the various points decided will demonstrate the proposition that an erroneous process of reasoning colors the various conclusions reached by the court of appeals on this subject.

1. Whether the Nine Mile-Halfway Drain Is An Improvement Which Could Not Lawfully Be Constructed.

The basic guide on this subject is the statute; next comes its interpretations by Michigan courts. The facts as to how the drain was constructed and the character of the territory are not in dispute; hence the decision as to the drain's legality becomes a pure question of law, and was so treated by the trial court.

At the outset we must note that the court of appeals, while professing to adopt the finding of the trial court as embodied in the confirmed master's report, did not do so. The court of appeals says (980) that the construction is "predominantly for sewer purposes." The confirmed report of the master, however, says (165) that it is impossible to say whether the purpose of removing sewage, or removing storm water, was most fundamental. After stating that the purpose behind the enterprise, meaning, of course, motives of the landowners and engineers, was to provide a "complete system for the removal of sewage and drainage" after laterals contemplated were constructed, the report says:

> "To go behind this finding and attempt to decide which purpose is fundamental is, in my opinion, an impossibility."

The concluding paragraph of the report on this subject contains the following:

> "I cannot go beyond my finding that the Nine Mile enterprise was undertaken for the dual purpose of sewerage and drainage, neither purpose being dominant."

This error by the court of appeals in stating the master's finding is not a trifling inaccuracy, for it is important to know under Michigan law whether sewage removal is actually the predominant or primary purpose. If not, the presumption of legality is not overcome.

The error of the court of appeals, as we see it, is that it ascribes to a decree of the Michigan Supreme Court with respect to this drain a statement of fundamental principles which should guide courts in deciding the issue of whether this is a drain or sewer, no matter what facts are presented or what new principles of law the state court of last resort may have subsequently announced. The fact that a decree has been rendered based on a finding of illegality, unsupported by any reason, causes, in the opinion of the court of appeals, this drain always to be illegal, no matter what facts are shown or who is showing them. On this theory, if a court once held a stream to be navigable upon evidence submitted in one case, no other party could by other evidence, or a showing of other principles of law, convince another court that the finding was incorrect.

The opinion of the Supreme Court of Michigan, in *Township of Lake v. Millar*, 257 Mich. 135, p. 139, shows no more than the following on the subject of illegality:

> "The drain in this case does not fall within the definition of a drain as prescribed by the statute in force at the time the sewer was laid out, established and constructed.

> "When the petition for the drainage district was filed in this case, Act No. 316, Public Acts 1923, was in force. Section 2, Chapter 1, of the act provides:
>
> > 'The word "drain" whenever used in this act shall be deemed to include any water course or ditch, opened or proposed to be opened, and improved for the purpose of drainage, and any artificial ditch or drain, levee, dyke or barrier or tile drain proposed or constructed for such purpose.'
>
> "Act No. 316, Public Acts 1923, was amended by Act 365, Public Acts 1925, which contained the same definition as Act 316, Public Acts 1923."

Two patent errors appear in this statement. First, the quoted clause was not a definition of the term "drain," but merely a statement that for the purpose of the statute it should be deemed to include other things not within the ordinary concept of the term. Second, Act 365 of Public Acts 1925 (see p. 1, appendix to our first brief), did change this clause by adding to it the words, "structures and such mechanical devices as will properly purify the flow of such drains."

Since the Supreme Court of Michigan overlooked the change in this statute which extended the word "drain" to include disposal plants, and the fact that the petition for this drain, filed after the amendment took effect, requested the building of a disposal plant as then authorized (955), the only reasonable inference from these errors is that the court either was not told, or failed to comprehend that these changes of the statute were applicable. Later, when *Detroit Trust Co. v. Dingman,* 291 Mich. 170, came before it, presenting the question of legality of another drain built in the form of an underground conduit, with profuse equipment for receiving and transporting sewage from the entire

area, and also a disposal plant, it recognized the importance of the provision previously overlooked and held the structure legal. This last decision is the best evidence of the present state law on the subject and cannot be brushed aside on the trivial ground that it related to a different drain, or that it failed to expressly overrule what had been said in the Township of Lake case, or by showing, as respondents do, insignificant differences in design and surrounding conditions. When all is said, we think it must be conceded that if these two cases had come before the Michigan court at the same time, the court would not have stultified itself by holding one project a sewer and the other a drain.

2. Effect of Bond Recitals.

The error in the court of appeals' opinion and our adversaries' argument on the effect of bond recitals is in using local authorities which have nothing to do with the subject as a guide for decision. The court of appeals says (985), after citing cases involving only controversies between taxpayers and assessing officials, that "it is the law of Michigan that where projects are illegal not from mere procedural deficiency, but from total lack of authority to construct the projects, bonds issued to defray the expense of the projects are void in the hands of innocent holders." There is no such decision in Michigan, and the court of appeals and counsel point to none. The only case where any effort was made to obtain an adjudication against drain bondholders was *Kinner v. Spencer,* 257 Mich. 142, where the court expressly declined to pass on their rights because they were not parties.

Of the prior decisions from Michigan on which the court of appeals relies, *Clinton v. Spencer,* 250 Mich. 135, and *Kinner v. Spencer,* 257 Mich. 142, are not in point because

there the petition expressly asked for the construction of a sewer. As the drain commissioner's jurisdiction rests upon a proper petition, *Ranney Refrigerator Co. v. Smith,* 157 Mich. 302, there was a want of jurisdiction from inception, thus causing the entire proceedings to be void. This the Michigan court points out in its later opinion in *Kennedy v. Dingman,* 272 Mich. 24, 30. In this and companion cases in this court, no complaint can be made of the petitions. They asked for drains to properly drain the lands. The quotation which the court of appeals takes from *Village of Oak Park v. Van Wagoner,* 271 Mich. 450, and all of respondents' quotations from the same case, appear in a minority oipnion in that case signed by three justices, which the remaining five justices, though concurring in the result, refused to sign. In *Meyering Land Co. v. Spencer,* 273 Mich. 703, and *Detroit Fire & Marine Insurance Co. v. County of Oakland,* 284 Mich. 130, the court merely finds from the evidence before it that sewers, and not drains, were intended, and that the commissioner, therefore, lacked jurisdiction to levy the tax. Respondents (p. 33 of their brief) also ask the court to consider a passage from a dissenting opinion in *Hankinson v. Deake,* 265 Mich. 1, which they think is so important as to call for italics, but they conveniently omit to say that it is found in a dissenting opinion. Also in the quotation on the same page from *Kennedy v. Dingman,* 272 Mich. 24, 30, there are serious omissions from the language of the Michigan court, without any indication that anything has been omitted from the quotation.

What a state court has said concerning the rights of taxpayers to have their taxes cancelled if the improvement is a sewer rather than a drain does not determine what should be said as to the rights of bondholders who bought their securities relying on the recitals therein. It is a fair inference from *Kinner v. Spencer (supra)* that the court recognized that bondholders might have rights and equities

which would require a decision upholding their bonds if their claims were before the court. In the absence of any opinion by a Michigan court as to the rights of such bondholders under those circumstances, the court of appeals and counsel are not following Michigan law when they say that bondholders have no rights, but are merely guessing as to what the Michigan court would say if the question were presented.

There is a marked distinction between these taxpayers' cases and the present bondholders' case. In the former the court was not cognizant of the fact that bonds had been issued with these recitals, and purchased in good faith. It was only rendering judgment on the particular facts before it. What a court decides with an inadequate factual background, and without considering the rights of other parties not involved in the transaction, may be quite different from what it decided with full knowledge of the facts and with all parties represented. It is erroneous to reason in the reverse fashion pursued by respondents and the court of appeals. By this reasoning they start with an inquiry as to whether taxes would be valid for the kind of improvement constructed. Having assumed that the taxes would be invalid, they say that then the bonds must be invalid. Respondents argue that if there was no jurisdiction or authority to levy taxes because the improvement was illegal, then it must follow that all bonds issued by the district, no matter what representations were contained in them, must be invalid. An abundance of court decisions refute the argument. The principle of estoppel in favor of good faith bondholders is now uniformly accepted, which operates to prevent against them the assertion of those facts on which taxpayers could otherwise rely to defeat the levy of taxes.

There being no opinion by a Michigan Circuit or Supreme Court either way on the precise question of whether a drain

district is estopped by its bond recitals to deny that the project for which the bonds were issued was a drain, we must necessarily look to Michigan decisions involving other bond issues where the controversies are as nearly similar as possible.

We have four decisions in Michigan relating to village or city bonds, cited in our first brief, p. 28, which ought to be accepted as close analogies by anyone willing to transform the concrete to the abstract. In Michigan, as in most jurisdictions, the constitution either expressly or impliedly forbids taxation for any but a public purpose. *People v. Salem,* 20 Mich. 452. Taxation for a private purpose or the pledging of credit for such purpose is illegal. It surely is a greater wrong to a taxpayer to impose a tax upon him to enrich some individual or a corporation, than to impose a tax for a public purpose, but under a wrong statute. The four cases we have cited all recognize such illegality, and hold that no one who extends credit to a municipality to enable it to act in this *ultra vires* manner can recover, if he knows the *ultra vires* purpose. But they all also hold that if he extends credit upon assurances of the municipality that it desires the money for a legitimate purpose, he may recover. What happens if he recovers judgment? From almost the beginning of statehood, Michigan statutes have provided that judgments against villages and cities may be certified to some officer, whose duty it is then to levy and spread a tax to pay it. Sec. 14960, Michigan Compiled Laws 1929. Thus the taxpayers in the village or city ultimately must pay a tax which has for its foundation acts of its officials which are wholly beyond their jurisdiction. The thoughtless would say that this is incongruous, but actually it is not. A municipality obtains the power to borrow money for its corporate needs, and in borrowing it must observe common rules of business honesty. People who choose to live in a municipality or own property therein subject to

taxation must pay taxes to discharge debts which the municipality incurs. The tax levied to pay the judgment is not to promote the illegal object which prompted the creation of the debt, but to discharge an obligation imposed on the municipality by its false representations and pretensions. There is nothing strange or unusual in this result. It applies to private corporations, voluntary associations and partnerships. All may be estopped by acts which are performed in the name of the entity, by an agent acting within the scope of his authority.

In asserting impliedly that Michigan law is opposed to this uniform rule, the court of appeals must have failed to recognize in these four cases which we have cited the abstract principles which govern them. It has been misled by a meaningless slogan often asserted by our adversaries that there can be no liability where there is total lack of jurisdiction, without noting that most slogans are only half truths.

The slogan is, of course, true under some conditions. If by total lack of jurisdiction is meant a total absence of any delegated power under all circumstances, which a purchaser of a bond must know, because he is presumed to know the law, it is true. If it means lack of authority in the official who acts for the municipality because he has not been authorized to act for it in the business under consideration, it is also true. But if power has been delegated, to be exercised only on a condition, and the officer authorized to execute the power is the one directed to perform the condition, the representation he makes in the bonds, as agent of the municipality in charge of obtaining the loan, is the representation of the municipality and estops it. The estoppel is not confined to mere procedural defects,—some failure to observe specified formalities. It applies to the most flagrant breaches of the law that can be imagined,—the most absolute abuses of the borrowing power.

The error of the Court of Appeals in rejecting the authority of these four Michigan decisions and advancing two other decisions, *Spitzer v. Village of Blanchard,* 82 Mich. 234, and *First Wisconsin National Bank v. Bessemer Township,* 286 Mich. 426, in support of the conclusion reached, is quite patent. These decisions do not support the claim that borrowing for an illegal purpose, and thus acting without jurisdiction, avoids the estoppel rule. They relate to the question of what facts recited by an issuing officer may not be relied upon. The facts which the officers in these cases recited were entirely outside the scope of authority of the officers. They were conditions required to exist and be known, but the legislature had prescribed other definite and readily accessible sources of information which would disclose their existence or non-existence. The bond purchaser failed to investigate the exclusive source of information prescribed. This is quite different from the facts here. In the drain bonds the matter relates to the acts of the commissioner himself, to the performance of his own duties. He had power and it was his duty to obviate every condition which would make this drain a sewer, to construct it so that no court could say it was a sewer. He represented that he had done so. He certainly had jurisdiction up to the time he began to plan the drain. If what he planned was too deep in the ground, too large, too expensive, too intricate to be a drain, then he should have eliminated the objectionable features. No bond case can be found where an issuing officer, who had power and whose duty it was to make the recitals in the bonds true, is not held to have authority to make the recitals. Throughout the entire brief of respondents, they refer to acts by the drain commissioner and others which they claim were illegal, but which took place after the bonds were sold and the consideration paid. While in taxpayers 'suits the court has at times referred to facts occurring subsequent to the levy of taxes, it has never

laid down any rule that the validity of taxes can be affected by the use to which the improvement has been put. On grounds of simple logic, it is impossible to see how a tax once legally levied, or a bond legally issued, could become illegal by any unlawful acts of the municipality in handling the improvement constructed. At the time the bonds were issued, June, 1926 (934), the drain had not been constructed, and no part of the proceedings taken prior to that time showed any violation of law, or any intent to issue the bonds for a purpose other than drainage within the district, as authorized in the constitution.

We will not enlarge on what we have said in our first brief in regard to the propriety of including in the judgment relief against parties other than the drain district. This is secondary or ancillary to the relief against the district, and entirely proper in an equity proceeding in the nature of mandatory relief, and is not dependent upon anyone being directly estopped other than the district. The relief against the county, townships and individual taxpayers is all based on the obligation of every taxpayer to pay taxes for the discharge of debts of a municipality which levies them, and to refrain from action which will impede tax collections. Confusion is thrown into this proposition by respondents' failure to recognize that at large levies were made against the County and the townships which it was their duty to pay, if the bonds constitute a debt of the district. The County and townships, by their action prior to the commencement of this suit, show their disposition to thwart by every means in their power action on the part of officers to compel them to pay the taxes levied against them. It was proper for the district court to enjoin such action. The officers who must perform ministerial duties to levy and collect taxes have refused to do so, and it was proper to order them to perform their duties. They have no concern with the reasons why the debt is established against the

district. It is as much their duty to levy taxes to pay bonds valid on the ground of the district's estoppel, as it would be if they were held valid on some other ground. *Board of Commissioners, Sante Fe County, v. Territory of New Mexico, ex rel Bird,* 215 U. S. 296.

A consideration of *Cooper v. Little,* 220 Mich. 62, and *Brooks v. Oakland County,* 268 Mich. 637, cited by the court of appeals and respondents, shows their inapplicability to this case. No claim was there made in relation to taxes levied against the county under the drain law; no injunction was asked against it to enjoin wrongful use of judicial process in tax evasion. In the one case, the point involved was whether a suit against a drain commissioner was county litigation so as to relieve the appellant from paying a court fee. In the other, the point involved was whether illegally levied drain taxes could be recovered from the county, because they had gone into funds kept by the county, it appearing that they had been paid out to discharge debts of the district, and that the taxpayer had failed to comply with statutory requirements as to suits to recover taxes alleged by him to have been wrongfully imposed.

3. Effect of Statute Prohibiting Collateral Attack on Drain Proceedings.

Respondents' argument, p. 54 of their brief, that the court of appeals did not err in ignoring the proposition that the certiorari provision of the drain law prohibits collateral attack, wholly misses the point of our argument and fails to meet it. We point to the express terms of the statute, its interpretation at the time the bonds were issued in *Township of Clarence v. Dickinson,* 151 Mich. 270, and *Stellwagen v. Dingman,* 229 Mich. 159, wherein the court declares that the statute forbids all collateral

attack where nothing more than a statutory violation is involved. We concede that after these bonds were issued the court has receded from the view formerly expressed, and now says that statutory violations of a jurisdictional character are subject to collateral attack. The point that they miss is that the Michigan Supreme Court has also held that changes in statutory construction subsequent to the accrual of rights under the prior construction are not applied retroactively to unsettle such rights. We cite two Michigan authorities which so hold, *Pittsburgh etc. Iron Co. v. L. S. Iron Co.,* 118 Mich. 109, 127, and *Donohue v. Russell,* 264 Mich. 217, 219. Respondents do not deny the fact that under the decisions prior to the issuance of these bonds the certiorari statute was interpreted as we contend it was, nor do they deny that in Michigan the rule of forward operation applies where to do otherwise would unsettle vested rights. These Michigan decisions accord with the rule stated in *14 Am. Jur.*, p. 345:

> "The general principle is that a decision of a court of supreme jurisdiction overruling a former decision is retrospective in its operation, and the effect is not that the former decision is bad law, but that it never was the law. To this the courts have established the exception that where a constitutional or statute law has received a given construction by the courts of last resort, and contracts have been made and rights acquired under and in accordance with such construction, such contracts may not be invalidated, nor vested rights acquired under them impaired by a change of construction made by a subsequent decision. * * * The true rule in such cases is held to be to give a change of judicial construction in respect of a statute the same effect in its operation on contracts and existing contract rights that would be given to a legislative repeal or amendment; that is, make it prospective, but not retroactive."

The same rule is also stated in quite similar language in *21 C. J.*, Sec. 194, b. p. 329.

Had counsel examined Judge Cardozo's opinion in *Great Northern Railroad Co. v. Sunburst Oil and Refining Co.*, 287 U. S. 358, 364, they would have seen that this is not a peculiar rule in the federal courts, but that it applies quite generally. Certainly if the decisions of a state court establish it in the law of a jurisdiction, *Erie Railroad Co. v. Tompkins (supra)* requires federal courts to follow it.

Respondents urge, however, that to hold the bonds enforceable by applying this statute would result in the imposition of a tax which would be unconstitutional. (See pp. 51 and 55 of their brief.) They cite in support of this, on p. 52, a passage from a minority opinion in *Village of Oak Park v. Van Wagoner,* 271 Mich. 450, and also quote from *Fuller v. Cockerill,* 257 Mich. 35, which they repeat on p. 55.

What constitutional right of a taxpayer could be violated by imposing a special tax on his property for the benefit accruing to it from a sewer? Such improvements certainly are public enterprises and can be the subject of special assessments. The Michigan Supreme Court has twice rejected the proposition that a subsequent amendment of the drain law authorizing the building of sewers and assessments therefor is unconstitutional. *Township of Warren v. Engelbrecht,* 251 Mich. 608; *Gray v. Dingman,* 279 Mich. 62. If this project was a sewer, the commissioner exceeded only a statutory authority and violated no constitutional provision, for the legislature could have declared in 1925, as well as in 1929, that a sewer could be built under the drain law. No intervening change in the constitution had occurred to give the 1929 amendment a constitutional basis, which it would not have had in 1925.

The nature of defects in drain proceedings which at the time these bonds were issued could be urged against the validity of taxes in collateral suits were only those which result from a failure to observe the requirements of due process. A commissioner may act without jurisdiction, as noted in *Township of Clarence v. Dickinson* and *Stellwagen v. Dingman (supra),* without violating due process. What he does may be wrong and without statutory authority, but that does not violate due process. From the time of the passage of the certiorari provision and until *Clinton v. Spencer,* 250 Mich. 135 (decided in 1930), there had been no Michigan decision permitting collateral attack on a drain tax, except where due process was violated. Either there was a lack of notice or fraudulent conduct of the officials in preventing an impartial hearing on some question vital to the taxpayer. It is only in *Clinton v. Spencer (supra), Kinner v. Spencer (supra), Township of Lake v. Millar (supra), Village of Oak Park v. Van Wagoner (supra)* and *Meyering Land Company v. Spencer,* 273 Mich. 703, all decided subsequent to the issuance of these bonds, that the court departed from its earlier rule and permitted an act involving only a statutory violation, unconnected with notice or hearings, to open the door to collateral attack against the express provisions of the statute.

Fuller v. Cockerill (supra) is clearly not in point, for the drain there considered was one proposed under Act 462 of Local Act 1907. This local act applied only to Muskegon County, and contained no certiorari provision or language prohibiting collateral attack. The drain had not been built, contracts had not been let, and the defect urged was that the superintendent of drains was proposing to levy taxes for a drain wholly within a village, to which his territorial jurisdiction did not extend. The

passage from the opinion quoted by respondents is undoubtedly true, for due process in special assessment proceedings requires that decisions be made and acts performed by an officer possesssing territorial jurisdiction. What the superintendent of drains was there proposing to do was the same as if the drain commissioner of Macomb County had attempted to perform the duties of a drain commissioner of another county.

The term "due process" may not be capable of precise definition, but it has never been held to apply where a party whose property may be subjected to a tax has had notice of the proceedings and an opportunity to be heard by a duly appointed officer acting within his territorial jurisdiction. It may have been a technical violation of the law to impose a tax upon the property owners of the drain district for an improvement which did not possess all the qualifications of a drain, but all taxpayers had notice of the proceedings and opportunity to object, and all, by failure to object and to follow same with certiorari proceedings, waived their objection.

III.

FEDERAL COURTS MAY UNDER PROPER CONDITIONS RESTRAIN PARTIES FROM USING STATE COURT DECREES TO IMPEDE TAX COLLECTIONS

It is true that the Court of Appeals does not in its decision expressly hold that it could not restrain the use of state court decrees to impede tax collections, but it is inferable from the opinion that it believes, as respondents contend, that *Erie Railroad Co. v. Tompkins* would now prevent such action. It says (982) that "sweeping injunctions" were issued by the district court, and that its decree is squarely at variance with the decree in the Meyering Land Company case (983).

We are concerned with this point because of the following reasoning. If this court should remand the case on the ground that the court of appeals erroneously decided that the bonds are invalid, we would be faced with the claim, as indicated by respondents in their argument on this point, that the district court erred in issuing these sweeping injunctions. They were necessary for the protection of bondholders, for if Township of Lake and other taxpayers could institute contempt proceedings based on their decrees, should tax officials perform the district court decree, taxes against these particular taxpayers or their lands would be lost, thus diminishing the security on which the bonds rest. From past decisions by this court, we think the most likely course which this court would pursue if it takes jurisdiction and finds error in the Court of Appeals opinion, will be a remand, in which event we think it important that some declaration be made to the effect that the district court had power to make the injunctions as sweeping as it did.

IV.

CONSIDERATION OF OTHER ARGUMENTS OF RESPONDENTS AS TO WHY THIS COURT SHOULD NOT TAKE JURISDICTION

On page 59 of respondents' brief, reference is made to *Municipal Investors Assn. v. City of Birmingham,* 298 Mich. 314, as constituting a reason why this court should not take jurisdiction. There is nothing therein that supports the decision of the court of appeals. As the record now stands, no one knows what the effect of Act 155, Michigan Public Acts of 1937, will be on the collectibility of assessments for this drain. The judgment of the district court does not order officers to impose or collect any taxes which are not collectible under the law, but merely

to exert their powers to the full extent as therein authorized.

There are no facts presented in this case to justify respondents' implication that this drain was the result of unwise "promotional schemes" by real estate subdividers, eager bond salesmen, etc. These proceedings were pending from November 19, 1924 to June, 1926 (950). The cost of publishing various notices exceeded $4000.00 (970). Personal notice had to be given to state and county road officers, and to township officers. There is not the slightest evidence of any imposition on anyone. It was considered a vitally needed public improvement at the time the proceedings were in progress, and the present flourishing condition of the community, with great building activity, could not exist were it not for the improved drainage which this improvement made possible. The real reason for this contest against the bonds is now, as always,—a sordid effort to unload the cost of the improvement upon creditors.

On page 5 of their brief, respondents refer to an advertisement for the sale of bonds in the Centerline Relief Case, Docket No. 290, as though the advertisement were part of the record in this case. The advertisement referred to applies solely to the Centerline case, and is not a part of the drain proceedings or the record in this case.

On page 7 respondents say that a stipulation of counsel in the lower court made the exhibits and testimony in all cases a part of the record in this case. Reference to the stipulation (245) will show that it is limited to the testimony and does not include exhibits.

CONCLUSION

We fail to see how respondents could misconstrue anything said in our petition and first brief to the effect that we deem conflict with local law an improper ground for this application. Rule 38 5b certainly indicates this as a proper ground, and we have invoked it. Too many cases brought to this court from a court of appeals have been reversed, where the only ground for certiorari is conflict with local law, to suppose that this court conssiders the matter closed by a decision of the court of appeals.

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